COMMERCE—ROUNDHOUSE LABORER INJURED WHILE DUMPING ASHES FROM ENGINE HELD NOT ENGAGED IN INTERSTATE COMMERCE.—Plaintiff was a laborer in a roundhouse. He was injured while removing ashes from an engine which had recently come in carrying interstate freight. The next trip of the engine was not known, as it hauled both interstate and intrastate trains and was not under orders. In an action under the Workmen's Compensation Law for injuries, the defendant contended that the plaintiff was engaged in interstate commerce. *Held,* the plaintiff was not engaged in interstate commerce. *Boals* v. *Pennsylvania R. Co.* (1920), 183 N. Y. Sup. 915.

The test as to whether one is engaged in interstate commerce seems to be: was the employee at the time of the injury directly engaged in interstate transportation or in work so closely related to it as to be practically a part of it? *Cincinnati, etc., R. Co.* v. *Hansford,* 173 Ky. 126. When the work is done directly on the tracks, bridges, or roadbed of an interstate railroad, it is uniformly held that the employee is engaged in interstate transportation, and the situation is not altered by its use as an intrastate railroad at the same time. *Pederson* v. *Delaware, etc., R. Co.,* 229 U. S. 146. Where the work done is on an engine, car, or other rolling stock, an employee is not engaged in interstate commerce unless the instrument under repair is designated positively for use in interstate commerce. *Narey* v. *Minneapolis, etc., R. Co.,* 177 Ia. 606. Its character as an instrument of commerce depends upon its employment at the time, not upon remote probabilities or upon accidental later events. *Mayer* v. *Union R.* Co., 256 Pa. St. 474. When the workman is not directly engaged on an instrument of interstate commerce, but his work is more remotely connected with it, the problem becomes more difficult. Such work as is so closely related to interstate commerce as to be in practice and legal contemplation a part of it is interstate transportation. A guard at a railroad crossing, a workman leaving his work on an interstate railroad, a brakeman on an intrastate car disconnecting an interstate car from it, have all been held to be engaged in interstate transportation. *Pederson* v. *Delaware, etc., R. Co.,* 229 U. S. 146; *Erie Railroad Co.* v. *Winfield,* 244 U. S. 170; *New York Central, etc., R. Co.* v. *Carr,* 238 U. S. 260. A workman on a railroad which has not yet become an instrumentality of commerce, an employee tearing down a roundhouse rendered useless by fire, a person taking down fixtures in an interstate roundhouse, have been held not to be engaged in interstate transportation. *Jackson* v. *Chicago, etc., Ry. Co.,* 210 Fed. 234; *Thomas* v. *Boston & M. R.,* 218 Fed. 143; *Shanks* v. *Delaware, etc., R Co.,* 239 U. S. 556. See *Ann. Cases,* 1918B, 52.

CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWER.—A statute empowered the state fire marshal, and other named officers, whenever they should find any building or other structure which, for want of repair, or by reason of age or dilapidated condition, or for any cause, was especially liable to fire, and which was so situated as to endanger other property or persons, to order the same remedied or removed at once. It also provided that a property owner, who felt he was aggrieved by the order, could appeal

to the state fire marshal, who would investigate the matter, but unless he revoked the order it should be complied with. Failure to comply with the order was made punishable by a fine; such penalty to be sued for in a justice of peace court or a court of record, with right of appeal. *Held,* the statute is unconstitutional as being a delegation of legislative power to the state fire marshal. *People ex rel. Gamber* v. *Sholem* (Ill., 1920), 128 N. E. 377.

The majority of the court rest their decision on the ground that the statute lays down no rule by which the fire marshal is to determine when a building is especially liable to fire. What is "proper repair," what shall constitute "age and dilapidated condition," are wholly within the discretion of the fire marshal. He is given arbitrary power to determine these matters without rule or limitation by which such determination shall be reached, except that such building shall be especially liable to fire. As the decision of the fire marshal is final, the property rights of the individual citizens may be taken away without just compensation or due process of law, as required by the constitution. Three judges dissented on the ground that the statute did not confer upon the fire marshal arbitrary authority to determine when a building was especially liable to fire. They hold that the provision in the statute which requires that the penalty can be enforced only by a suit before a justice of the peace or in a court of record gives the property owner the right to appear and contest the decision of the fire marshal. It would seem that the decision of the case must be determined by the construction of this part of the statute. If, under the statute, an aggrieved property owner cannot, when sued for the penalty, contest the decision of the fire marshal, then the decision of the majority is correct. However, it seems to the writer that the minority view is better, and that, in a suit for the penalty, the property owner can contest the fire marshal's decision. Unless he has this right, the suit in such court can have no real value. The statute gave the right of appeal from the judgment of the trial court. That right can mean nothing if the only proceeding in the trial court is the formal entering of judgment against the property owner for the amount of the penalty. It is not unreasonable to suppose that the legislature intended that a property owner should, in a suit for the penalty, have the right to contest the decision of the fire marshal, and it is the duty of courts, in passing on the constitutionality of a statute, to give it such construction as will sustain it rather than one which will destroy it. It is difficult to define the line which separates legislative power to make laws from administrative power to make regulations. It seems obvious that the legislature could not define in detail the exact conditions, which under the different circumstances of location, construction, condition, use, and for lack of repair, or by reason of age or dilapidated condition. All the legislature can do is to define them in general terms, and leave the determination of the fact to some administrative official. In *Union Bridge Co.* v. *U. S.,* 204 U. S. 364, the constitutionality of an Act of Congress was upheld, which declared that navigation should be freed from unreasonable obstructions arising from bridges of insufficient

height, width and span, or other defects, and which, after declaring this general rule, imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of enforcing the rule. To deny to Congress the authority to delegate to the executive branch of government the exercise in specific instances of a discretionary power, which from the nature of the case Congress could not itself exercise, would be, the courts say, "to stop the wheels of conduct of public business." In *Yick Wo* v. *Hopkins,* 118 U. S. 356, an ordinance forbade any person to carry on a laundry within the city without the consent of the board of supervisors, except in buildings of brick or stone. Plaintiff, a native of China, who had complied with all the existing regulations for the prevention of fire, was refused such consent by the board, upon his application. The ordinance was held unconstitutional, as it conferred upon the board arbitrary power, at its own will, to give or withhold consent as to persons or places, without regard to the competency of the persons applying or the propriety of the place selected for carrying on the business. This case, however, is distinguishable from the principal case. In *Yick Wo* v. *Hopkins, supra,* there was an arbitrary power in the board to grant or refuse consent, and not a conferring of a discretion to be exercised upon a consideration of the circumstances of each case. In the principal case, the rule of public policy, which is the essence of legislative action, had been determined by the legislature. What was left to the fire marshal was not the determination of what public policy demanded, but simply the ascertainment of what the facts in each case required to be done, according to the terms of the law. In England Parliament may confer upon administrative boards the power to arbitrarily decide, without hindrance from the courts, what method of application an Act of Parliament is to have. *Local Gov't Board* v. *Arlidge* [1915], A. C. 120. See also the article in 32 HARV. L. REV. 447.

CONSTITUTIONAL LAW—MAKING STATE MEDICAL ASSOCIATION THE STATE BOARD OF HEALTH, WITHIN THE POWER OF THE LEGISLATURE.—An act of the Alabama legislature making the State Medical Association the State Board of Health was attacked upon the ground that it was beyond the power of the legislature to confer the authority given upon a purely private corporation. *Held,* that the act was valid. *Parke v. Bradley* (Ala., 1920), 86 So. 28.

The court took the view that by virtue of the act the admittedly private association became a public board, and that the powers delegated were conferred upon the latter organization, and not upon the Medical Association as such. There was no dispute as to the power of the legislature to pass health measures and to create a board with administrative functions to carry out its regulations. The position of the court therefore seems conclusive as to the principal objection made to the act. A further objection was raised, however, conceding this view of the effect of the act was correct, that the members of the board so designated were in effect necessarily selected by members of the State Medical Association acting in their private